United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1108

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	Criminal Action
Plaintiff-Appellee,	:	Docket No. 76-1108
vs.	:	Sat Below: Hon. Kevin T. Duffy, and a Jury
JOHN J. DWYER and JOHN S. DOBRANSKI,	:	
Defendants-Appellants.	:	On Appeal from the U. S. District Court of the Southern District of N.Y.

BRIEF FOR DEFENDANT-APPELLANT JOHN S. DOBRANSKI

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MISCELLANEOUS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Where the government seeks to use a declaration of one co-conspirator made out of the presence of another conspirator, and out of court, against the other conspirator, does that other conspirator have the right to an instruction that the jury may consider the declaration as evidencing his guilt only if they find by independent evidence that there was a conspiracy and he was a member of it?

2. Where there is no expert testimony as to the condition of an alleged firearm at the time it was the subject of a transaction covered by the Federal Firearms Control Laws, and where there is affirmative evidence produced by the government that the article is in a changed condition at the time of the trial, will the evidence support a finding of violation of the gun control laws?

3. Whether the indictment must be dismissed where commission of a criminal act (mailing a live cartridge to a co-defendant) under the government's aegis by an informer led to the government obtaining relevant evidence?

NOTE: All citations in the following brief are to pages and lines of the transcript.

STATEMENT OF THE CASE

Although defendant Dobranski did not take the stand, it was clear that his defense was that he was no more involved than a taxi driver who brought Dwyer to the Smith apartment. T333-2; T347-22. Cross-examination of the government witnesses brought out that, although Dwyer and Dobranski arrived together on both visits to Smith's apartment in an automobile owned and operated by Dobranski, the contraband items were carried from the trunk of the automobile to the apartment in closed containers by Dwyer with some assistance by persons other than Dobranski. Dobranski further showed by cross-examination of the government witnesses that he took no part in negotiations for the sale of any items, and did not even remain in the room where the negotiations took place at all times. There was no showing by the government that Dobranski profitted from the transactions.

The connection to Dobranski to the crimes was very tenuous until the government introduced four letters, discovered at the last minute before trial, T36-20 to T37-2, from Dwyer to Smith. Smith had testified when Dwyer made the arrangements to bring the guns to Smith's apartment, he told Smith he was having trouble with his car and "would try to have B.S.J. drive him." T8-15. The letters do not refer to "Dobranski," but to "B.S.J." Excerpts referring to B.S.J. follow.

Exhibit 10 - September 6, 1974: "B.S.J. may have a spare 40 for sale. I'll check this weekend. The problem with 40s is that, like Thompsons, they're popular and everyone wants one. To me they're o.k. (I've had about eight of them.) But nothing spectacular. It's the movies' influence, I guess."

Exhibit 29 - September 24, 1974: No mention of B.S.J.

Exhibit 31 - September 29, 1974: "An old rebel once asked me if B.S.J. was my partner. I said he was, more or less. The guy said, "The only thing you can count on a partner for in any business but ESPECIALLY GUNS, is to screw you first chance he gets." Good advice."

Exhibit 32 - October 1, 1974: "I guess you got your OGCR letter by now. If we're going in Nov., we better make some plans this weekend, especially about the Holiday Inn. They had that stuff about the football hoods being in town that weekend. I may drag B.S.J. along as a guest. If you're in the right mood, his bullshit can be funny."

The court's rulings on the admissibility of these letters were spread over a number of places in the record. First the government offered the earliest letter, Exhibit 10. T12-19. Dwyer's attorney stated he had no objection. T12-21. Dobranski's attorney made no comment on this letter at this time, identified so far only as a letter to the witness from Dwyer.

Next, the government offered the second letter, dated September 24, 1974, marked as Exhibit 29. T13-25. The court, reflecting the same belief as to the government's purpose in making the offer as is implicit in the silence of Dobranski's attorney to the offer of Exhibit 10, above, asked: "It is being offered, I assume, solely as to the defendant Dwyer?" T14-3. The government attorney then stated: "These letters are being offered as statements by co-conspirators (sic) in furtherance

of the conspiracy." T14-6. The court then gave the following admonition for the protection of Dobranski: "Ladies and gentlemen, we are taking into evidence subject to connection this letter, and until the connection is made by the government, you will not get to see the letter." T14-9.

Then the third and fourth letters, dated September 29, 1974, Exhibit 31, and October 1, 1974, Exhibit 32, were identified. T15-2 to 14. Then the government referred back to the two earlier letters that had been identified previously by the witness by exhibit number, but not by date, for the purpose of specifying the dates of these two earlier letters. T15-15 to 18. Immediately following that, the record quotes Dobranski's attorney as saying: "No objection." But in context, this statement must refer to the latter two letters, Exhibits 31 and 32, and not Exhibits 10 and 29 which had already been ruled on, as stated above.

Immediately after the statement that there was no objection by Dobranski's attorney, the court stated: "Mark them in evidence." T15-20. The record next notes that Exhibits 31 and 32 were received in evidence. T15-21. Again, read fairly in context, Dobranski's attorney's lack of objection to Exhibits 31 and 32 was premised on the court limiting these letters the same as it had limited Exhibit 29 to protect Dobranski.

A short time later, the government's attorney requested the opportunity to pass all four letters to the jury. T20-18 to 22. The court stated: "In due time." T20-23.

Later, but still before the letters had been circulated to the jury or read to them, the government attorney brought up the subject of the authenticity of the letters. T65-6. During the resulting colloquy, Dobranski's attorney stated: "I take it, your honor, my position that these various letters originating from Dwyer have not been sufficiently tied to Dobranski is on the record and my position is preserved." T69-6. The court immediately responded: "Your position is that they are taken subject to connection. They are not connected yet." T69-8.

Toward the close of the government's case, the government attorney announced he was about to read the four letters to the jury. T306-5. Dobranski's attorney immediately interrupted: "May I have an instruction it is not binding upon defendant Dobranski?" T306-8. Dobranski's attorney was simply trying to have the court repeat in the hearing of the jury what it had stated outside the hearing of the jury in the previous reference.

However, instead of the same specific instruction, at this point the court said, in the presence of the jury: "I will give a complete instruction at the end of the case." T306-10. Still assuming the instruction given to the jury at the end of the case would be consistent with what the court had previously stated outside the hearing of the jury, Dobranski's attorney thanked the court. T306-12. Thereupon, the government attorney read the letters to the jury.

No evidence beyond the letters was ever offered by the government to show that they were written with Dobranski's authorization or approval.

During the government's summation, it referred to Dobranski almost exclusively as "B.S.J." It harped on the letters. T765-5 to 8. In rebuttal summation, the government came back to the letters, inviting the jury to take them into the jury room and look at them in evaluating Dobranski's guilt or innocence. Dobranski requested the charge that the letters were not evidential against Dobranski unless the jury found by independent evidence that Dobranski was a member of the conspiracy. T765-22. The court declined to so charge. T766-4.

The jury interrupted its deliberations to ask for the letters. T771-21.

In a little over an hour after it received the letters, the jury was back in the court room returning guilty verdicts against both defendants on all counts.

POINT I

The refusal of the trial court to charge that the letters written by co-defendant Dwyer are not evidential against defendant Dobranski without independent proof connecting Dobranski to the conspiracy was prejudicial error.

It is well settled that declarations of one conspirator in furtherance of the purpose of the conspiracy are admissible against any other member of the conspiracy. 16 Am. Jur. 2d. Conspiracy, Sec. 38 (1964). However, there must be proof, independent of the declaration sought to be admitted, of the existence of the conspiracy. Some cases have debated the point whether the independent proof of the conspiracy must be by evidence convincing beyond a reasonable doubt, or meeting some other standard higher than prima facie proof. The majority rule seems to be that only prima facie proof of the conspiracy independent of the declaration offered need be presented. 16 Am. Jur. 2d, Conspiracy, Sec. 28 (1964); Annot.: Necessity and Sufficiency of Independent Evidence of Conspiracy to Allow Admission of Extrajudicial Statements of Co-conspirators, 46 A.L.R. 3d 1148 (1972).

Section 36 of the last cited annotation reads in part:

"In order for the extrajudicial statement of a co-conspirator to qualify under the co-conspirator's exception, three distinct conditions must be met. First, the statement must have been made in furtherance of the conspiracy. Second, the statement must have been made during the pendancy of the conspiracy. Finally, and as reflected by all of the cases within the scope of the present comment, the existence of the conspiracy must be shown by independent evidence."

In Glasser v U.S., 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, rehearing denied, 315 U.S. 827, 86 L. Ed. 1222, 62 S. Ct. 637 (1942), the court said that the declarations of one conspirator are admissible over the objection of an alleged co-conspirator who was not present when they were made only if there is proof aliunde of the conspiracy, "otherwise hearsay would raise itself by its own bootstraps to the level of competent evidence."

Aside from the debate referred to above over the quality of the independent proof of the conspiracy that is necessary for the admission of a declaration by one conspirator against another, the cases are rich with statements of a rule as to the admissibility of such evidence. However, far fewer cases seem to have given attention to the question what instruction should be given to the jury with respect to the use of the hearsay evidence of the declaration of a co-conspirator. It would seem on principle that the judge's finding that a prima facie case of conspiracy was made out by independent evidence should not obviate the need for an instruction to the jury. Because the judge finds the independent evidence prima facie sufficient does not mean that the jury must or will believe it. If the premise for the admission of the hearsay is the presence of independent proof of the conspiracy, the independent proof should be required to be not merely proof which the jury may accept, but which it in fact accepts.

People v. Doble, 203 Calif. 510, 265 Pac. 184 (1928) stated that the declarations of a co-conspirator are not admissible in the absence of an instruction that they are not binding

unless and until, independent of such declarations, the conspiracy has been shown beyond a reasonable doubt.

People v. Steccone, 36 Cal. 2d 234, 233 P. 2d 17 (1950) disapproved of so high a standard of proof as beyond a reasonable doubt. It stated that the prosecution need only prove the conspiracy by independent evidence sufficient to make a prima facie case. But apparently the court did not alter the ruling of the Doble case that the defendant is entitled to an instruction that the jury may not consider the co-conspirator's statement except after a finding aliunde by proper proof that there was a conspiracy.

Skillian v. Commonwealth, 206 Ky. 586, 268 SW 299 (1925) stated:

> "It becomes the duty of the court to instruct the jury that if they believe from the evidence independent of and aside from the evidence of the statements of the alleged co-conspirator, spoken outside the presence of the one on trial, beyond a reasonable doubt that such a conspiracy was formed and in existence at the time of such statements, that they may consider such statements as evidence against the defendant in trial, but if they do not so believe beyond a reasonable doubt, independent of such statements, they will not consider such statements of the co-conspirator as evidence against the defendant on trial but should return a verdict of not guilty."

Schultz v. State, 133 Wisc. 215, 113 NW 428 (1907) ruled that in order that the statements of the alleged conspirators in the execution of the common purpose can be properly considered on the question of guilt or innocence, it is not sufficient that the court had determined that a prima facie case of conspiracy has been made out, but the jury must first be satisfied by the evidence that a conspiracy in fact existed.

However, Texas seems to have taken a different view than California, Kentucky and Wisconsin. The Texas decisions are discussed in the annotation cited supra. However, the Texas decisions seem to be out of harmony with Glasser v. U.S, supra, on the question whether there need be independent evidence of conspiracy to make the declarations admissible.

For articles discussing conspiracy generally, and incidentally discussing the viciousness of the bootstrap effect of the declaration of the co-conspirator being admissible because there is a conspiracy, but the declaration itself being the principal proof of the conspiracy, see: 85 Harv. L. Rev. 1378 (1972); 113 U. of Pa. L. Rev., 741 (1965); 72 Harv. L. Rev. 920 (1959); 25 U. of Chi. L. Rev. 530 (1958); 3 Buffalo L. Rev. 242 (1954); 52 Mich. L. Rev. 1159 (1954); 1 A. L. R. 2d 1780.

Making it a jury function to decide in the last analysis whether the proof aliunde of the conspiracy is sufficient to warrant consideration of the declaration of the co-conspirator is a substantial protection to criminal defendants. For example, in Mayola v. U.S., 71 F. 2d 65 (9th Cir. 1934), it was held that the fact that the defendant had accompanied the declarant on a trip to another country where the declarant disposed of a quantity of counterfeit money he had in his possession was insufficient to establish the existence of a conspiracy between the parties to counterfeit the money.

In the present case, the credibility of all of the government's witnesses was badly shaken by cross-examination bringing out untrue statements, contradictions of other government

witnesses and intentions to deprive defendants of their constitutional rights. If the jury had been instructed that it could not consider the B.S.J. letters as evidence against Dobranski unless they found by independent evidence that there was a conspiracy of which Dobranski was a member, it is unlikely that Dobranski would have been convicted. This is not only the impression of defendant's trial counsel but based on the jury's reactions as late as their request for the sending of the letters into the jury room, but is implicit in the government's last minute efforts to bolster its case by getting these letters from Smith and by the almost total concentration on the letters in the portion of the summations devoted to the case against Dobranski.

Smith, Kelly and Costabile, the three government witnesses who were inside the apartment where the gun transactions took place, had many flaws in their testimony. Smith had pleaded guilty to one count of a multi-count indictment just before the present trial began, with the understanding that the other counts would be dismissed, and the government would call to the attention of the sentencing judge that Smith was cooperating. T19-8 to 21; T22-4 to T24-2; T24-12 to 20; T50-6 to T51a-7; T71a-4 to 10; T85-16 to T86a-4.

Smith's wife was also exposed to criminal liability for possession of the same firearms that were in the Smith apartment. T51a-8 to T53a-2. Her exposure to liability was called to Smith's attention by Kelly's superior. T52a-13 to 19. But no charges were brought against Smith's wife. T52a-24 to T53a-2.

Although Smith had begun cooperating with the government the day of his arrest, giving them a written statement at that time, he made no disclosure in that statement that Dobranski was known as B.S.J. or that Dobranski had stated in Smith's presence that he and Dwyer had fired off a few rounds through one of the machine guns. These absolutely vital pieces of evidence only came to Smith's mind, supposedly, on the very eve of trial. T47a-5 to T50a-5; T80a-16 to T84a-13.

One of the macine guns was manufactured originally in the Soviet Union or some other communist country as a 7.62 mm. gun, was captured by the Germans in World War II, and converted by them to a 9 mm. caliber. T220a-21 to T221a-24. Kelly, testifying before the grand jury, attributed the exact opposite of that statement to Dobranski. He had the sequence of the calibers backwards and the sequence of the manufacture and remanufacture by the Russians and the Germans backwards. T162a-13 to T166a-17. Kelly's grand jury testimony was consistent with his original handwritten notes of the incident. T163a-22. Despite the implausibility of Dobranski, a supposed gun dealer, getting the facts that jumbled, Costabile swore that was what happened. T234-14 to 21.

All the government witnesses agreed that the weapons were brought into Smith's apartment in closed containers, and that they were not carried by Dobranski. There was no testimony concerning the actions of Dobranski on the days in question prior to his arrival at the area of the apartments. Thus, the government's

evidence that he had guilty knowledge was slim. Prior to Smith coming up with the B.S.J. letters, the government considered its strongest evidence against Dobranski Kelly's recollection, recorded in his notes, that at one of the meetings in Smith's apartment, upon inquiry as to what was in one of the closed containers, Dobranski replied: "Toys." T102a-9. Apparently the government felt that "toys" could not be explained as a good faith misunderstanding as to what was in these containers which must have been quite heavy, far beyond the weight of toys, and must have made noises typical of heavy objects rather than toys as they jounced along when carried. However, Costabile's notes indicated that Dobranski had said: "Tools." T332a-24. Despite the notation in his own handwriting, T332a-25 to T333a-2, Costabile testified that "tools" was a misspelling for "toys," and that, just as Kelly had testified, this was what Dobranski had remarked. T340a-14. Costabile added the word "toys" on the eve of his testimony contemporaneous with a telephone conversation with Kelly. T338a-23 to T341a-2.

Costabile was practically making a second career out of being an informer against gun collectors. He had "made" in excess of 20 cases. T251a-7 to 13; T252a-3 to 21. One of the government agents had told Costabile that his life was in danger, presumably from his work as an informant. T282a-21 to T283a-12.

Costabile had been arrested a few months prior to the incidents in this case for violations of the gun control laws, whereupon he began to cooperate with the government. T229a-4 to

11. He had previously been arrested for the interstate transportation of stolen property, and sentenced under the Youth Corrections Act. T241a-12 to T242a-5.

So, for a variety of reasons, Costabile was seeking to please the government.

Kelly admitted falsely telling the persons arrested on October 5, 1974 that the entire conversations had been recorded electronically, and that he told them this untruth for the purpose of getting them to surrender their constitutional right against self-incrimination, and to make a statement to the government that could be used against them. T152a-11 to 25.

All in all, the testimony showing that Dobranski had guilty knowledge was strained. Dwyer, on the other hand, although not taking the stand, through the opening statement on his behalf and the members of his family who testified, admitted that he owned vast quantities of war paraphernalia, consistent with his defense of insanity. He did not refute the testimony that he carried the weapons into Smith's apartment and he received the proceeds of the sales that occurred. There was evidence tending to show he was apprehensive about being caught in these acts he knew to be illegal. It would have been entirely consistent with that that he would shield Dobranski from guilty knowledge. There was no need for Dobranski to know what was in the containers placed in the trunk of his car. The government's own evidence showed that Dwyer brought Dobranski into the picture because Dwyer had a transportation problem, his car was not working.

Without the introduction of the letter in which Dwyer practically said Dobranski was his partner in gun transactions, it seems improbable that the jury would have found Dobranski guilty beyond a reasonable doubt.

POINT II

There was insufficient proof that the items sold by Dwyer on September 1, 1974 were firearms or machine guns within the meaning of the statute.

(Note: This point is based on a similar trial motion. During its argument, various undisputed facts were referred to without objection. See T354, 355, 356 and 357.)

At the time it was obtained by the government (September 1, 1974), there was a magazine or clip inserted in the so-called Russian machine gun. T146-16. The government's expert, Erickson, testified that without a magazine or clip it would be impossible to operate this article in a manner that would bring it within the definition of a machine gun in the United States Code. T222-7 to T226-6.

He testified that he did not have the magazine that was with this gun at the time it was obtained. T224-3 to 8. He utilized another clip which did not make a good fit. T224-9 to T226-6. He held it in a manner that he described as critically. T224-23. With his knowledge and twenty-some years of experience, he was able to operate that weapon, firing two cartridges with a single pull of the trigger. T225-4.

He testified that if someone not expert as himself attempted this, that it could have done damage to the gun. T224-24 to T225-3; T225-18.

There has been no explanation of why the magazine that was with the gun when it was obtained was not made available to the government's expert witness. There has been no explanation of why the magazine was not produced at the trial.

Its absence is not attributable to the defendants because the entire article was purchased by Kelly, the undercover A.T.F. agent, on September 1, 1974 and taken away by him.

The only competent witness who testified on personal knowledge whether this gun was a machine gun was Erickson. He described the testing he did with the critically held clip as not only not employing the magazine associated with the article when obtained from the defendants, but not employing a magazine really intended for use with this weapon by the manufacturer.

Kelly testified he understood it to be a machine gun, but his belief was based on its resemblance to a picture he had seen in a book, and to having been told it by someone else. T93-18 to T95-12; see also T162-1 to 7.

Erickson was very clear in his testimony that he had no knowledge of the condition of this article at any time prior to testing it. No tests had been run on the so-called Russian machine gun by the government to indicate whether it had ever in its entire history been fired by any person prior to the time that Erickson did his testing of it on December 10, 1975, just about a week prior to the trial, about 14 months after the alleged crime. T139-8.

He testified that it was determinable by common testing procedures whether the gun had been previously fired. But these procedures were not performed!

The absence of any proof that it had been fired at any previous time, the non-production of the magazine that allegedly was taken on September 1, so that it would be available to the

defendants to cross-examine on or to exhibit to the jury, or to seek tests on, and the difficulty that the expert, Erickson, had in using some other magazine put together adds up to a conclusion that it would be unfair, particularly to defendant Dobranski, to subject him to conviction, since everyone agrees he wasn't the owner of this article and did not have custody or control of it at any relevant time.

There was no competent testimony that this so-called Russian weapon was a machine gun, or even a firearm, when it was taken. Erickson explicitly said he had no knowledge of its condition at the time of the arrest.

Without any explanation of the absence of the magazine having been offered by the government, with defendant Dobranski admittedly never having owned the so-called Russian gun, and having done nothing with it but possibly hold it in his hand and try to show Kelly how to operate its bolt, put together demand a conclusion that it is unfair to Dobranski to subject him to conviction of any of the offenses he is charged in the indictment based on any consideration of this so-called Russian machine gun.

With respect to the other machine gun, there is an absence of proof that it was a machine gun within the definition of the statute at the time it was seized. This is the time that the offense is charged. Erickson was the only competent witness on this point and he eschewed knowledge of the condition of these items as of the times defendants possessed them. He did not know if they " could fire ammunition" at that time. T215-12 to 24.

POINT III

The indictment should be dismissed because of the government's collusion in an independent crime that was a substantial factor in obtaining evidence.

Defendant Dobranski adopts by reference the argument made in Point III, beginning on page 27, of the brief of defendant Dwyer.

CONCLUSION

For the reasons stated in Point III (obtaining evidence by a criminal act), the indictment should be dismissed. Alternatively, for the reasons stated in Point I (denying a charge on the foundation for consideration of a statement of a co-conspirator), or Point II (failure of proof of the proscribed character of the firearms), defendant John S. Dobranski should be granted a new trial.

Respectfully submitted,

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